

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A VARIANCE PERMIT )  
GRANTED TO TED LAVALLEY BY THE )  
CITY OF SEATTLE AND DENIED BY THE )  
DEPARTMENT OF ECOLOGY )

TED LAVALLEY and CITY OF )  
SEATTLE, )

Appellants, )

v. )

STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )

Respondent. )

SHB No. 78-7

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the request for a review of a denial by the Department of Ecology of a variance granted by the City of Seattle, was brought before the Shorelines Hearings Board, Dave J. Mooney, Chairman, Chris Smith, Robert E. Beaty, Gerald D. Probst, and Rod Kerslake on May 22, 1978 in Renton, Washington. Hearing examiner William A. Harrison presided.

1 Appellant Ted LaValley appeared and represented himself; appellant  
2 City of Seattle was represented by Ross A. Radley, Assistant City  
3 Attorney; respondent Department of Ecology was represented by Robert V.  
4 Jensen, Assistant Attorney General.

5 Having heard the testimony, having examined the exhibits, having  
6 reviewed the City of Seattle's Hearing Memorandum, having heard the  
7 argument of counsel, and being fully advised, the Shorelines Hearings  
8 Board makes the following

9 FINDINGS OF FACT

10 I

11 Appellant and his wife, Mr. and Mrs. LaValley, own a lot on the  
12 southern shore of Lake Washington, in Seattle. The lot is typical of  
13 those in the area in that it is about 50 feet wide and falls steeply  
14 (45 degrees) from Rainier Avenue to the water's edge, a distance of  
15 some 20 horizontal feet. The lot then continues underwater some 65  
16 additional feet to the Inner Harbor Line. The LaValley's seek to  
17 build their home on that lot.

18 On January 9, 1978, appellant filed with the City of Seattle an  
19 application for a substantial development permit with two variances  
20 from the City of Seattle Shoreline Master Program.<sup>1</sup> The proposed  
21 developrent consisted of the home which the LaValleys plan, described as  
22 a single family residence, 40 feet wide by 28 feet deep by 35 feet high,  
23 with an accessory deck, 12'x40', and a recreational pier 5'x36'. Part of  
24 the house itself, and all of the dock, would be constructed over the

25  
26 1. The Shoreline Master Program of the City of Seattle was approved  
27 by the Department of Ecology on June 30, 1976, amended March 11, 1977.  
hereby take official notice of that master program as filed in the office  
of the Code Reviser of the State of Washington.

1 water, on pilings. Such construction is typical in the area, and both  
2 adjacent lots presently have houses constructed partially over the  
3 water, on piling, along with docks on piling, just as the appellant  
4 proposes. The waterward edge of appellant's house and the end of  
5 appellant's dock would not go beyond, respectively, a line connecting  
6 the waterward edge of the adjacent houses and a similar line connecting  
7 the ends of the adjacent docks.

8 On January 18, 1978, public notice of appellant's proposed develop-  
9 ment was published by newspaper. There was no opposition to appellant's  
10 proposed development from the general public, including nearby neighbors.

11 On March 2, 1978, upon the studied consideration of its Department  
12 of Community Development, the City of Seattle granted the shoreline  
permit which appellant applied for. That permit authorized variances  
14 from two specific requirements of the Seattle Master Program:

15 1. Section 21A.72: ". . . new residential structures over  
16 water are prohibited."

17 2. Section 21A.33 and Table 2-D-a: "Maximum height (of a  
18 building) over water: 15 feet."

19 The permit thus granted by the City of Seattle was then submitted  
20 to the State Department of Ecology pursuant to RCW 90.58.140(12):

21 Any permit for a variance or conditional use by local govern-  
22 ment under approved master programs must be submitted to the  
23 department for its approval or disapproval.

24 By letter dated April 6, 1978, the Department of Ecology denied  
25 the variance pertaining to over-the-water construction:

26 The Department of Ecology has reviewed the above referenced  
27 permit which would allow the varying of two shoreline  
regulations. One regulation restricts the height of a  
structure from the surface of the water and the other  
regulation prohibits structures over water.

28 FINAL FINDINGS OF FACT,  
29 CONCLUSIONS OF LAW AND ORDER

1 The Seattle Master Program states in Section 21A.72(A) "...  
2 new residential uses over water are prohibited..." It is and  
3 has been the position of the department that prohibitions  
4 cannot be varied. Variances can be used for bulk, setback or  
5 other physical restrictions, not for allowing a prohibited  
6 use. The department hereby denies this variance.

7 The appellant appeals from this denial by respondent, Department  
8 of Ecology.

## 9 II

10 In addressing variances from regulations established pursuant to  
11 the Shoreline Management Act, RCW 90.58.100(5) provides:

12 Each master program shall contain provisions to allow for the  
13 varying of the application of use regulations of the program,  
14 including provisions for permits for conditional uses and  
15 variances, to insure that strict implementation of a program  
16 will not create unnecessary hardships or thwart the policy  
17 enumerated in RCW 90.58.020. Any such varying shall be  
18 allowed only if extraordinary circumstances are shown and the  
19 public interest suffers no substantial detrimental effect.  
20 The concept of this subsection shall be incorporated in the  
21 rules adopted by the department relating to the establishment  
22 of a permit system as provided in RCW 90.58.140(3).

23 The referenced RCW 90.58.140(3) provides:

24 Local government shall establish a program, consistent with  
25 rules adopted by the department, for the administration and  
26 enforcement of the permit system provided in this  
27 section. . . .

28 The Department of Ecology regulation pertaining to variances  
29 granted under the Shoreline Management Act, WAC 173-14-150, became  
30 effective on August 26, 1976, and provides:

31 A variance deals with specific requirements of the master  
32 program and its objective is to grant relief when there are  
33 practical difficulties or unnecessary hardships in the way  
34 of carrying out the strict letter of the master program. A  
35 variance will be granted only after the applicant can  
36 demonstrate in addition to satisfying the procedures set  
37 forth in WAC 173-14-130 the following:

(1) That if he complies with the provisions of the master  
program, he cannot make any reasonable use of his property.

1 The fact that he might make a greater profit by using his  
2 property in a manner contrary to the intent of the program  
is not a sufficient reason for a variance.

3 (2) That the hardship results from the application of the  
4 requirements of the act and master programs, and not, for  
example, from deed restrictions or the applicant's own  
actions.

5 (3) That the variance granted will be in harmony with  
the general purpose and intent of the master program.

6 (4) That the public welfare and interest will be preserved;  
7 if more harm will be done to the area by granting the variance  
than would be done to the applicant by denying it, the variance  
will be denied.

8 The City of Seattle Master Program contains the following language as  
9 to variances:

10 Section 21A.61 Shoreline Variances.

11 In specific cases the Director with approval of the Department  
12 of Ecology may authorize variances from specific requirements  
of this Article when there are practical difficulties or  
unnecessary hardships in the way of carrying out the strict  
13 letter of the shoreline master program. A shoreline variance  
will be granted only after the applicant can demonstrate the  
14 following:

15 (a) That if he complies with the provisions of  
16 the master program, he cannot make any reasonable  
use of his property. The fact that he might make  
17 a greater profit by using his property in a manner  
contrary to the intent of the program is not a  
18 sufficient reason for a variance.

19 (b) That the hardship results from the application  
of the requirements of the Act and shoreline  
20 master programs, and not, for example, from deed  
restrictions or the applicant's own actions.

21 (c) That the variance granted will be in harmony  
22 with the general purpose and intent of the  
shoreline master program.

23 (d) That the public welfare and interest will be  
24 preserved.

25 In authorizing a shoreline variance, the Director may attach  
thereto such conditions regarding the location, character or  
other features of a proposed structure or use as may be  
26 deemed necessary to carry out the spirit and purpose of this  
Article and in the public interest.  
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FINAL FINDINGS OF FACT,

1 III

2 On prior occasions, the Department of Ecology has approved variances  
3 allowing uses that were otherwise prohibited on shorelines within  
4 the City of Seattle. The variance application of Hankmeier, Burnett  
5 and Strauss, Seattle file No. SMA 77-24, is of particular importance.  
6 There, the Department approved a variance for over-the-water construction  
7 of three new residential structures, under the same Seattle Master Program  
8 and Department of Ecology variance rule, WAC 173-14-150, as are now  
9 applicable to this matter.

10 IV

11 Any Conclusion of Law which should be deemed a Finding of Fact is  
12 hereby adopted as such.

13 From these Findings, the Shorelines Hearings Board comes to these

14 CONCLUSIONS OF LAW

15 I

16 Only one issue is presented by the Department of Ecology's denial  
17 of appellant's request for variance. That is: Whether a variance  
18 from a shoreline master program may authorize a prohibited use ("use  
19 variance") or whether a variance may only authorize a deviation from  
20 bulk, setback or other physical restrictions on the construction and  
21 placement of structures ("area variance").

22 II

23 The legal standards which will resolve this issue are (1) the  
24 variance provision of the Shoreline Management Act, RCW 90.58.100(5);  
25 (2) the Department of Ecology variance regulation, WAC 173-14-150, and  
26 (3) the Seattle Master Program variance provision, Section 21A.61.  
27 (The text of each is in Finding of Fact II.)

The statute itself, RCW 90.58.100(5) does not expressly provide for nor prohibit use variances, as contrasted with area variances. Rather, it includes the unadorned word "variances." By the same statutory section, however, the Legislature accorded to local government and to the Department of Ecology, the duty of establishing a variance program, by rulemaking:

Each master program [of local government] shall contain provisions . . . for permits for . . . variances . . . The concept of this subsection shall be incorporated in the rules adopted by the department [of Ecology] relating to the establishment of a permit system . . . . [Brackets added.]

In their exercise of rulemaking power, both the Department of Ecology and the City of Seattle have set down rules which authorize use variances and which thus contradict the position taken by the Department of Ecology in this matter. The Department's variance regulation, WAC 173-14-150, states:

A variance deals with specific requirements of the master program and its objective is to grant relief when there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the master program. . . . (Emphasis added.)

The wording of Section 21A.61 of the Seattle Master Program is identical in substance. (See Finding of Fact II.) There is nothing in this standard which prompts an inquiry as to whether the "specific requirement" of the master program deals with "use" or "area," much less anything ruling out a variance should the specific requirement pertain to "use" rather than "area."<sup>2</sup> On the contrary, there is further wording in

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2. By contrast see Proposed Amendment to WAC 173-14-150 (Draft of January 24, 1978) proposed by the Department of Ecology, but not yet adopted. That proposal deletes the entire present variance regulation and substitutes wording which begins:

The purpose of a variance permit is to grant relief to specific bulk or dimensional requirements set forth in the master program. . . .

FINAL FINDINGS OF FACT,

1 the Department's variance provision, echoed in the Seattle Master  
2 Program, which militates against the position that those rules exclude  
3 use variances. One of the mandatory tests for obtaining a variance is  
4 that the applicant must show:

5 (1) That if he complies with the provisions of the  
6 master program, he cannot make any reasonable use of his  
property.

7 In Kooley and Pierce County v. Department of Ecology, SHB No. 218 (1976),  
8 we had occasion to examine this test in the light of customary zoning  
9 principles as set out in the treatises. There we concluded that the  
10 above test is an expression of the "unnecessary hardship" standard  
11 customarily applied by courts in cases of use variances, while area  
12 variances customarily entail a different standard. This choice of  
13 standards buttresses our conclusion that a "specific requirement"  
14 of a shoreline master program which prohibits a use can be the proper  
15 subject of a variance. Under the facts and circumstances of this case,  
16 the Department of Ecology's denial of the variance was erroneous and  
17 should be reversed.

18 While the merits of the height variance granted to appellant,  
19 LaValley, by the City of Seattle are not at issue, we observe that  
20 the building height appears to be compatible with the surrounding  
21 homes.

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27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER



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III

Any Finding of Fact which should be deemed a Conclusion of Law  
is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The action of the Department of Ecology denying the variance granted  
by the City of Seattle to Ted LaValley is hereby reversed.

DATED this 9<sup>th</sup> day of June, 1978.

SHORELINES HEARINGS BOARD

  
DAVE J. MOONEY, Chairman

  
CHRIS SMITH, Member

  
ROBERT E. BEATY, Member

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ROD KERSLAKE, Member

  
GERALD D. PROBST, Member

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER